

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PIERRE MARTIN MURPHY,

Defendant-Appellant.

UNPUBLISHED

January 21, 2010

No. 289562

Wayne Circuit Court

LC No. 08-011367-FC

Before: Murphy, C.J., and Jansen and Zahra, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as a second habitual offender, MCL 769.10, to 81 months to 16 years in prison for armed robbery, and a consecutive two-year term for felony-firearm. Defendant appeals as of right and raises three issues. First, defendant claims the evidence identifying him as the perpetrator was insufficient as a matter of law. Second, he claims he was denied the effective assistance of counsel. Third, he challenges the trial court's imposition of attorney fees at sentencing without first determining whether defendant has an ability to pay those fees. We conclude there is no legal merit to any issue raised by defendant. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

An armed gunman robbed a 7-11 at which Stevie Stromski worked. Stromski discerned that the perpetrator was a man dressed as a woman. A "BOL" (be on lookout) with a description went out to area police departments, and defendant was identified as matching the description. Stromski identified defendant in a photo lineup the following day, and unequivocally identified him at the preliminary examination and trial. Defendant denied that he committed the robbery.

I. Identification Evidence

Defendant first argues that the identification evidence was insufficient. Citing *Simmons v United States*, 390 US 377; 88 S Ct 967; 19 L Ed 2d 1247 (1968), defendant asserts that the identification was the result of a highly suggestive procedure because the photograph in the first lineup recurred in the second lineup. The *Simmons* Court held that there is a danger of incorrect identification where a witness is shown "pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized. *Id.* at 383. In

Simmons, about six snapshots that all included the defendant were shown to witnesses. There was no photo lineup. Here, there were two photo lineups, and each had one picture of defendant. Moreover, the record indicates that defendant looked dissimilar in the two photographs. There is no indication that the recurrence of defendant in the two lineups in any way suggested to Stromski that the photograph in the second lineup was that of the perpetrator. On the facts of this case, the recurrence of defendant's photograph "was [not] so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Id.* at 384.

Defendant further asserts that the trial court, sitting as the trier of fact, "betrayed a surprising ignorance of the factors which contribute to the general fallibility of eyewitness identifications." The record belies such ignorance. The trial court noted that identification was the salient issue in this case and went through a detailed analysis of the identification testimony to ascertain its reliability. The court noted that Stromski was staring straight into the perpetrator's face and thus, had a good chance to see him; that she observed him for several minutes from behind and then at the counter; that she did not know defendant; that she was within two to three feet of the perpetrator; that the area was well lit; that she was not under stress before the transaction turned into a robbery or on the following day when she made the photo lineup identification; that the identification on the following day was within a relatively short time period; and that Stromski never equivocated. The court also took note of the fact that Stromski did not identify defendant in the first photo lineup, but found this of little consequence given the second photo lineup identification; an identification at the preliminary examination; and the identification at trial. The court also found that other evidence--the observation of defendant wearing a wig and spandex pants a couple of months beforehand--lent credence to Stromski's identification. This analysis bespeaks an awareness of the problems with eyewitness identification and the fact that the trial court took great care in evaluating whether the identification in this case was reliable.

II. The Assistance of Counsel

Defendant next argues that he received ineffective assistance of counsel because his attorney did not highlight differences between the description of the perpetrator and defendant; did not bring out that the perpetrator was scene driving away in a Ford Bronco and that defendant did not own or drive a car and had no driver's license; did not request independent fingerprint testing which, he maintains, would have established his innocence; did not seek enhancement of a video surveillance tape that could have included or excluded him as the robber; and did not challenge the photo lineup arrays. Since there was no evidentiary hearing in this case, review is limited to mistakes apparent on the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). All of these claims rely on documents appended to defendant's brief on appeal¹ with the exception of the failure to challenge the photo arrays. As

¹ We note that even in these documents defendant has failed to establish ineffective assistance. He has not shown that an independent fingerprint analysis or the analysis of the video surveillance tape would have amounted to exculpatory evidence. There is no evidence that the scars on his hand and arm were pronounced. Further, the fact that defendant did not have a driver's license or own a Bronco would not have been significantly exculpatory; he could have nonetheless driven away in one. Moreover, while the discrepancy between the description of

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noted above, such a challenge would have been fruitless. Counsel is not required to raise futile objections. *Id.* 425. Defendant has failed to show that his counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms; a reasonable probability that, but for an error, the result of the proceedings would have been different; or that the resultant proceedings were fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

III. Reimbursement of Fees for Appointed Counsel

Finally, defendant objects to the imposition of attorney fees at sentencing without consideration of his future ability to pay. This challenge is premature. In *People v Jackson*, 483 Mich 271, 275; 769 NW2d 630 (2009), our Supreme Court held that “such an analysis is only required once the imposition of the fee is enforced.”

Affirmed.

/s/ William B. Murphy

/s/ Kathleen Jansen

/s/ Brian K. Zahra

(...continued)

defendant’s age with his actual age would have been pertinent, we note that the photo array photographs appended to the prosecutor’s brief do not indicate that he had a youthful appearance.